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IN THE SUPREME COURT OF FLORIDA

GARY LAWRENCE,

Appellant,

v. Case No. 85,725

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BARBARA J. YATES
Assistant Attorney General
Florida Bar #293237

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

While Lawrence's factual statement is generally correct, the state offers the following summary of the facts for the Court's convenience.

On the morning of July 29, 1994 Charles Haney, a contractor, found a charred body by the road in a new subdivision in Santa Rosa County. (T 191).[1] After investigating this murder, the sheriff's office arrested Gary Lawrence, and the state charged him with first-degree premeditated or felony murder, conspiracy to commit murder, armed robbery of less than $300, and auto theft. (R 1).

The trial started on March 14, 1995. According to the evidence produced at trial, Lawrence was released from prison on January 10, 1994. (R 455). He met Brenda Pitts shortly thereafter, and the two married in March. (Defendant's exhibit 4 at 4). They did not live together long, however, and at the time of the murder Lawrence was not living in Brenda's apartment. (T 630; 633; see also T 260). The victim moved into Brenda's apartment a couple of weeks before the murder. (T 260).

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[1] "T" refers to the trial transcript, located in volumes IV through VIII, pages 1 through 755. "R" refers to the record, located in volumes I through IV, pages 1 through 617. As indicated, volume IV contains both record and transcript.

In his confession, Lawrence told Charles Grice of the Santa Rosa County Sheriff's Office that he and the victim drove Brenda to work in the victim's car on the morning of July 28. (T 423). They arrived at a friend's house around 10:30 to 11:00 a.m. (T 219) and left around noon to pick up Brenda. (T 220; 236). Lawrence, Brenda, and the victim came back to the friend's house before 3:30 p.m. (T 244). The victim was drunk and went inside and lay down on the couch. (T 221; 237). Brenda went in to check on the victim several times while the others stayed on the porch drinking. (T 223; 238). Lawrence said that he "was tired of seeing Brenda going in to Michael and talking to Michael" (T 239) and threatened to beat the victim and 'sling him through the window." (T 240). Lawrence and Brenda argued. (T 240). Lawrence and the victim talked, however, and shook hands. (T 241). When Brenda started in again, the friend told them to leave. (T 227; 241).

The trio arrived at Brenda's apartment around 5:00 p.m. (T 264). Just after arriving, Lawrence drew out a knife, threw it on the ground, and punched the victim, who did not fight back. (T 266-67). Brenda and her daughter separated them. (T 267; 311). Lawrence and the victim then walked around the yard and talked and 'seemed like everything was all right." (T 267; 312) . Lawrence, Brenda, and the victim came into the apartment about two hours

later, and the victim lay down on the couch while Lawrence and Brenda sat together whispering. (T 268, 271; 315). Lawrence and Brenda told Brenda's daughter and her friend to go into the daughter's bedroom and stay there. (T 272, 276; 317). The adults gathered several weapons, including a metal pipe and a baseball bat. (T 274; 319). After the adults left the bedroom, the girls heard pounding noises and the victim asking Lawrence to stop hitting him. (T 277-78; 322-23). Lawrence told a neighbor that he beat the victim with the pipe until it bent and, when the victim said he could not move, got the baseball bat and beat the victim with it. (T 362-63). Brenda told the girls to go get Chris Wetherbee (T 281); when they returned, they saw that a mop handle had been stuck down the victim's throat. (T 282).

After the victim was dead, Lawrence and Brenda discussed how to get rid of the body, and Lawrence decided to burn it. (T 285; 333). They went through the victim's pockets and belongings. (T 367-68). Brenda used bleach on the rug and sandpaper on the wood frame of the couch to remove the victim's blood (T 289; 335), and the couch cushions and the weapons were thrown into a pond behind the apartment. (T 289-90; 335). When Lawrence returned from disposing of the body, he and Brenda danced and laughed. (T 292;

336; 369). They then went for beer and danced more and got very drunk. (T 369-70).

The trial court granted Lawrence's motion for judgment of acquittal as to felony murder and robbery. (T 617). Thereafter, the jury found Lawrence guilty of first-degree murder, conspiracy to commit murder, theft of less than $300, and motor vehicle theft. (R 201; T 751-52). At the penalty phase on March 17, 1995 Lawrence presented testimony from his brother, a psychologist, and a psychiatrist. The jury recommended that he be sentenced to death by a vote of nine to three. (R 203; 564). The court heard argument from the parties on April 27, 1995 (R 571) and set sentencing for May 5, 1995. (R 607). On that date, the court sentenced Lawrence to death, finding that the state had established three aggravators (under sentence of imprisonment; heinous, atrocious, or cruel; and cold, calculated, and premeditated) that outweighed the nonstatutory mitigators. (R 613; 227 et seq.). This appeal then followed.

SUMMARY OF THE ARGUMENT

Issue I: When measured against truly comparable cases, Lawrence's death sentence is proportionate.

Issues II and III: Lawrence did not preserve for appeal his complaint about the wording of the CCP instruction. In any event the court gave a constitutionally adequate instruction. The facts support the court's finding CCP in aggravation. If the court erred in that finding, however, any error would be harmless.

Issues IV and V: The complaint about the wording of the HAC instruction is procedurally barred and without merit. The facts support the trial court's finding HAC in aggravation.

Issue VI: This issue is procedurally barred because Lawrence did not object to the instructions he now attacks.

Issue VII: The trial court properly considered all of the proffered mitigation.

ISSUE I

WHETHER LAWRENCE'S DEATH SENTENCE IS PROPORTIONATE.

Lawrence argues that his death sentence is disproportionate. There is no merit to this claim.

In his brief Lawrence states that "the case in aggravation was that Lawrence was on conditional release status at the time of the murder and the murder was superficially heinous, atrocious or cruel." (Initial brief at 19). This argument ignores the facts that Lawrence was under sentence of imprisonment when he committed this murder, that beating the conscious victim's head to pieces and shoving a mop handle down his throat was more than just "superficially" heinous, atrocious, or cruel (HAC), and that the trial court also found the murder to have been committed in a cold, calculated, and premeditated (CCP) manner. Thus, three aggravators exist, and Lawrence's reliance on single-aggravator case is misplaced. E.g., Thompson v. State, 647 So. 2d 824 (Fla. 1994); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Penn v. State, 574 So. 2d 1079 (Fla. 1991); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Smalley v. State, 546 So. 2d 720 (Fla. 1989); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993). All of these cases

had mitigators comparable to or greater than those established by Lawrence and fewer aggravators.

Lawrence cites only two multiple-aggravator cases; both are factually distinguishable. In Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), the state established five aggravators that were to be balanced against three statutory mitigators; i.e., both mental mitigators and Fitzpatrick's age. In its proportionality review this Court described Fitzpatrick as a "seriously emotionally disturbed man child," id. at 872, and noted that HAC and CCP were "conspicuously absent." Id. Here, on the other hand, HAC and CCP, as well as a third aggravator, are conspicuously present, and the mitigation is not nearly as compelling **as** Fitzpatrick's.

In Terrv v. State, 668 So. 2d 954 (Fla. 1996), the state established two aggravators: prior violent felony for a contemporaneous crime and committed during a felony. The Court compared Terry with two other robbery-murder cases, Thompson and Sinclair, that, as stated earlier, each had only a single aggravator. As pointed out by then-Chief Justice Grimes in dissent, there are no other cases "in which we have heretofore set aside the death penalty on grounds of proportionality where there were two statutory aggravating circumstances and only minimal nonstatutory mitigation." Id. at 966 (emphasis in original).

Here, the state proved three aggravators - that this heinous crime was committed in a cold, calculated, and premeditated manner by a person under sentence of imprisonment, while Lawrence established only nonstatutory mitigation.

Cases other than those cited by Lawrence are more comparable to this **case** and show that Lawrence's death sentence is proportionate. E.g., Johnson v. State, 660 So. 2d 637 (Fla. 1995) (three aggravators, fifteen nonstatutory mitigators); Johnson v. State, 660 So. 2d 648 (Fla. 1995) (same); Finney v. State, 660 So. 2d 674 (Fla. 1995) (three aggravators, five nonstatutory mitigators); Atwater v. State, 626 So. 2d 1325 (Fla. 1993) (three aggravators, nonstatutory mitigators), cert. denied, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994); Arbelaez v. State, 626 So. 2d 169 (Fla. 1993) (three aggravators, scant mitigation), cert. denied, 114 S. Ct. 2123, 128 L. Ed. 2d 678 (1994); Bruno v. State, 574 So. 2d 76 (Fla.) (three aggravators, nonstatutory mitigation), cert. denied, 502 U.S. 834, 112 S. Ct. 112, 116 L. Ed. 2d 81 (1991). Even if this Court were to strike one of the aggravators, death would still be the appropriate and proportionate penalty when compared with double-aggravator **cases** that had at least as much mitigation as the instant case, E.g., Kilsore v. State, 21 Fla. L. Weekly S345 (Fla. August 29, 1996) (two statutory, several

nonstatutory mitigators) ; Pope v. State, 21 Fla. L. Weekly S257 (Fla. June 13, 1996) (same); Orme v. State, 21 Fla. L. Weekly S195 (Fla. May 2, 1996) (both statutory mental mitigators); Geralds v. State, 674 So. 2d 96 (Fla. 1996) (one statutory, several nonstatutory mitigators); Gamble v. State, 659 So. 2d 242 (Fla. 1995) (same); Windom v. State, 656 So. 2d 432 (Fla. 1995) (three statutory, several nonstatutory mitigators); Lucas v. State, 613 so. 2d 408 (Fla. 1992) (several nonstatutory mitigators), cert. denied, 114 S. Ct. 136, 126 L. Ed. 2d 99 (1993).

This case has three strong aggravators and, as stated by the trial court, the mitigation "is minor in comparison to the magnitude of the crime committed." (R 238). The cases that Lawrence relies on are factually distinguishable, and his death sentence truly is proportionate "to the magnitude of the crime committed." This horribly gruesome killing was well beyond the "norm" of capital felonies. Evidence showed that, while Lawrence beat him with both a metal pipe and a baseball bat, the victim was conscious and pleading for Lawrence to stop. (T 277-78; 322-23; 362). The victim was still conscious until the mop handle was rammed down his throat. (T 325). Several witnesses described the victim's injuries: 'He did not have any skin left on his face and it was all torn off or beat off and you could see where he did not

have any, part of his nose bone. You could see down to the skull." (T 283). Additionally, 'his chin was sort of knocked to his - it had been hit over to his left ear. And he, he didn't have much of the right side of his face." (T 325). A third witness said the victim's 'head was about all caved in" and that one "eyeball was sticking out three or four inches from his head all swelled up." (T 361). Although the court sustained the defense objection to it, this witness' statement summed up the situation well: "And it looked like something off of one of the real good horror movies." (T 361). Lawrence has shown no impropriety in his death sentence, and that sentence should be affirmed.

ISSUES II AND III

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON AND FOUND THE COLD, CALCULATED, AND PREMEDITATED (CCP) AGGRAVATOR .

Lawrence argues that the trial court gave the jury an insufficient instruction on the CCP aggravator and that the court erred in finding that aggravator had been established. Lawrence did not preserve the first claim for appeal. Moreover, both of the claims are meritless.

At the penalty-phase charge conference Lawrence objected to the jury's being instructed on the CCP aggravator because it was

not supported by the evidence. (R 438). The court decided to instruct the jury on CCP. (R 439). The wording of the CCP instruction was not discussed at the charge conference, but, at the end of a pretrial motion hearing two weeks before that conference, the prosecutor called the judge's attention to the new CCP instruction promulgated in Jackson v. State, 648 So. 2d 85 (Fla. 1994). (R 412). Thereafter, the court instructed the jury as follows:

> Third. The crime of which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> In order for you to consider this aggravating factor you must find the murder was cold, and calculated and premeditated and that there was no pretense of moral or legal justification.
>
> Cold means the murder was the product of calm and cool reflection.
>
> Calculated means the defendant had a careful plan or prearranged design to commit the murder.
>
> Premeditated means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder.
>
> A pretense of moral or legal justification is any claim of justification or excuse that though insufficient to reduce the degree of homicide nevertheless rebuts the

> otherwise cold and calculating nature of the homicide.

(R 557-58).

By failing to object to the wording of the CCP instruction, Lawrence waived any complaint about that instruction. Gamble v. State, 659 So. 2d 242 (Fla. 1995). Regardless of the lack of objection, however, this claim has no merit. The above-quoted instruction is the one promulgated in Jackson, 648 So. 2d at 89-90 n.8, which the Court held to be constitutionally adequate.[2]

The trial court made the following findings as to the CCP aggravator:

> 3. The capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. - Section 921.141(5)(i), Florida Statutes.
>
> The evidence supports beyond a reasonable doubt that the Defendant possessed the heightened premeditation required to prove this aggravating circumstance. The Defendant and the victim were together from at least 10:30 in the morning. They drove Brenda Lawrence to work, visited with acquaintances

[2] Lawrence quotes an instruction purportedly given by the trial court on CCP. (Initial brief at 29). A comparison with the record, however, reveals a different situation. The first sentence of the quoted instruction is, indeed, from the penalty instructions. (R 557). The remainder of the quoted instruction, on the other hand, is from the instruction on premeditation given at the guilt phase. (T 731).

> of the Defendant and drank with each other throughout the day. The Defendant's self expressed motivation for the murder was the victim's affair with Defendant's wife. Yet when that fact was clearly manifested to the Defendant, he did nothing more than enter into a minor skirmish with the victim. That altercation was easily broken up by the Defendant's stepdaughter and wife. It wasn't until later and after the victim fell asleep that the Defendant commenced his murderous acts. He observed the victim lying asleep on the couch, went into another room with his wife to collect some of the murder weapons, told his stepdaughter and her friend that he was going to "knock off Mike" and then told the minor girls not to come out of their room no matter what they heard. He initiated the murder process by inflicting numerous blows to the victim and paused only to listen to the victim plea[d] for the Defendant to stop and allow the victim to leave the home. The Defendant's response was a barrage of more blows to the victim['']s head area. Recognizing that the victim was still alive, the Defendant then prevailed upon his wife to obtain a dagger and had her stab the victim. The Defendant then left the room in which the victim lay while the Defendant searched for yet another murder weapon. Upon finding a mop, the Defendant rammed said mop handle into the victim's throat and as the [Defendant later] admitted to investigating officers he did so because 'he reckoned to kill 'em."

(R 233-34). Lawrence argues that the facts do not support finding this aggravator, but the trial court's findings and conclusions are supported by the record.

After Lawrence, Brenda, and the victim returned to Brenda's apartment around 5:00 p.m. on July 28, 1994 (T 264), Lawrence and the victim got into a scuffle. (T 266; 310). Lawrence threw a knife on the ground and hit the victim in the chest; the victim did not fight back. (T 267; 311). Brenda and her daughter Kim pulled Lawrence off the victim (T 267; 311), following which Lawrence and the victim walked around the yard talking, and "they seemed like everything was all right." (T 267). Lawrence and the victim shook hands and went to buy beer. (T 312).

Two hours later the trio came into the apartment. (T 268). The victim lay down on the couch while Lawrence and Brenda sat in chairs in the living room, "kind of whispering and trying to keep it to themselves." (T 271; 315). Lawrence and Brenda told Rachel and Kim to go into Kim's bedroom. (T 272). The adults later came into that bedroom, and Lawrence told the girls "that they were going to knock off Mike." (T 274). He told them to stay in the bedroom and not to come out. (T 317). Lawrence and Brenda took a metal pipe[3] and an aluminum baseball bat[4] from the bedroom and returned to the living room. (T 274-76; 319). The girls then

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[3] State's exhibit #16.

[4] State's exhibit #17.

heard pounding noises from the living room and the victim's pleading for Lawrence to stop hitting him. (T 277-78; 322-23).

Lawrence beat the victim with the metal pipe until it bent. (T 355). He then got the bat and started beating him with it. (T 355-56). Brenda came back into the bedroom and said that they couldn't "knock Mike off for nothing." (T 279). The victim was still alive when the girls went into the living room, but was badly injured. (T 324-25). Brenda told Kim and Rachel to go get Chris Wetherbee. (T 281). When they returned, a mop handle was protruding from the victim's throat. (T 282). The mop was not among the original weapons, and, as pointed out by the trial court, Lawrence obviously located and used it after beating the victim with both the pipe and the bat. (R 234). When asked why he used the mop handle, Lawrence responded: 'Trying to kill him, I reckon." (R 181).

Lawrence and Brenda then discussed what to do with the body. (T 285-86; 333). Lawrence decided to burn it. (T 285; 333). Lawrence and Brenda went through the victim's pockets and bags, one of which Lawrence wanted to keep after getting rid of evidence that it was the victim's. (T 367-68). When Lawrence and Wetherbee returned from dumping the body, Lawrence and Brenda danced and laughed. (T 292; 336; 369). They talked about getting title to

the victim's car put in their names. (T 293). Then, Lawrence and Brenda went to get beer, followed by more dancing when they returned. (T 337; 370). After their return, they also discussed what story to tell if anyone came looking for the victim. (T 371).

Four elements must be proved to establish the CCP aggravator: the murder must be "cold," it must be the product of a careful plan or prearranged design, there must be heightened premeditation, and there must be no pretense of moral or legal justification. Fennie v. Stat-e, 648 So. 2d 95 (Fla. 1994), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995); Jackson; Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), cert. denied, 115 S. Ct. 1705, 131 L. Ed. 2d 566 (1995); Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 s. ct. 943, 130 L. Ed. 2d 887 (1995).

It is obvious that this was not a spur of the moment killing. Lawrence and Brenda sat in the living room whispering, obviously planning to kill the victim. Then they methodically gathered the instruments with which Lawrence effected this murder and made sure the children left the living room and stayed away. These actions demonstrate that Lawrence had a plan or prearranged design. Cf. Asavv , State, 580 So. 2d 610 (Fla.) (CCP upheld where Asay had only twenty minutes to reflect), cert. denied, 502 U.S. 895, 112 S. ct. 265, 116 L. Ed. 2d 218 (1991).

Lawrence's actions also demonstrate the coldness and heightened premeditation needed to establish CCP. Even though Lawrence beat the victim with a metal pipe until it bent, the victim did not die. Lawrence then changed to a metal baseball bat and beat the victim more. Finally, he located a mop and shoved the handle down the victim's throat, and the victim eventually died.

Lawrence had plenty of time to reflect on his acts during this extended sequence of events, but did not stop. He had ample time to reflect on his actions. The time it took to kill the victim coupled with the calculated searching out of weapons with which to effect the murder and the deliberate ruthfulness of Lawrence's actions demonstrate that this murder meets the standards for establishing CCP. Fennie; Wuornos: Walls; Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert. denied, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994); Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993); Bruno v. State, 574 So. 2d 76 (Fla.), cert. denied, 502 U.S. 834, 112 S. Ct. 112, 116 L. Ed. 2d 81 (1993).

Lawrence argues that he was enraged by Brenda's involvement with the victim and that alcohol "eliminated" his control. (Initial brief at 27). The facts, however, belie these contentions. Witnesses testified that, after their afternoon

skirmish, Lawrence and the victim talked and shook hands. Moreover, although Lawrence had been drinking during the day, Wetherbee described him only as "slightly intoxicated." (T 363). He reiterated that he knew Lawrence had been drinking, but did not think he was drunk. (T 382). Lawrence got very drunk only after making the beer run after disposing of the victim. (T 384). All in all, Lawrence displayed too much purposeful conduct for the current claim to be given much credence. See **Johnson** v. State, 608 So. 2d 4 (Fla. 1992), cert. denied, 508 U.S. 919, 113 S. Ct. 2366, 124 L. Ed. 2d 273 (1993).

Lawrence also argues that he had a pretense of justification for killing the victim because of the victim's involvement with Brenda. As several witnesses testified, however, Lawrence and Brenda were not living together at the time of the murder and had not done so for some time. (T 604; 630; 633). Moreover, Lawrence carried on much as Brenda did, and they did not conduct themselves as a married couple. (T 604-05). Lawrence relies on Hamilton v. State, 21 Fla. L. Weekly S227 (Fla. May 23, 1996), but that reliance is misplaced. Hamilton killed his wife, and this Court held that CCP had not been established. If Lawrence had killed Brenda, who he fought with and got mad at when she came on to other men (T 605; 629), Hamilton might be relevant. As it is, the facts

do not support this self-serving claim. Wuornos; Walls; Arbelaez. Instead, cases that discounted a "domestic" claim are more comparable to this case. E.g., Occhicone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied, 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991); Porter v. State, 564 So. 2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 1106 (1991); Turner v. State, 530 So. 2d 45 (Fla. 1987), cert. denied, 489 U.S. 1040, 109 S. Ct. 1175, 103 L. Ed. 2d (1989).

The facts support the trial court's finding that the state established the CCP aggravator. Where there is a legal basis for finding an aggravator this Court will not substitute its judgment for that of the trial court. Occhicone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied, 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991). Therefore, the finding of CCP should be affirmed.

Even if this Court decides that the trial court erred in finding that the CCP aggravator had been established, no relief is warranted. As stated by this Court previously: "If there is no likelihood of a different sentence, the trial court's reliance on an invalid aggravator must be deemed harmless." Posers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 s. ct. 733, 98 L. Ed. 2d 681 (1988). Striking CCP would leave two

valid aggravators, i.e., under sentence of imprisonment and WAC. The trial court found that five nonstatutory mitigators had been established (Lawrence cooperated with law enforcement; he has a learning disability and low IQ; he had a deprived childhood and poor upbringing; he had been using alcohol; and he does not have a violent history) (R 236-37), but concluded that the aggravators outweighed the mitigators and that "[t]he evidence of mitigation although present is minor in comparison to the magnitude of the crime committed." (R 238). Given the presence of two strong aggravators, the lack of significant mitigators, and the jury's recommendation of death, there is no reasonable likelihood that Lawrence would have received a sentence of life imprisonment if the CCP aggravator had not been considered. Cf. Geralds v. State, 674 So. 2d 96, 104-05 (Fla. 1996) (no reasonable likelihood of different sentence where striking an aggravator left two aggravators to be weighed against a statutory mitigator and three nonstatutory mitigators); Barwick v. State, 660 So. 2d 685, 697 (Fla. 1995) (no likelihood of different sentence when eliminating CCP left five aggravators to be weighed against "minimal mitigating evidence"); Fennie, 648 So. 2d at 99 (eliminating CCP would be harmless because "[t]he totality of the aggravating factors and the lack of significant mitigating circumstances conclusively

demonstrate that death is the appropriate penalty in this case") Pietri v. State, 644 So. 2d 1347, 1354 (Fla. 1994) (striking CCP left three aggravators and, even if the trial court had found mitigators, there was no reasonable likelihood of a different sentence), cert. denied, 115 S. Ct. 2588, 132 L. Ed. 2d 836 (1995); Green v. State, 641 So. 2d 391, 395 (Fla. 1994) (striking HAC was harmless where three aggravators remained to be weighed against weak mitigation), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995); Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994) (striking two aggravators was harmless where the three remaining aggravators "far outweigh the minimal mitigating evidence"), cert. denied, 115 S. Ct. 1372, 131 L. Ed. 2d 227 (1995); Peterka v. State, 640 So. 2d 59, 71-72 (Fla. 1994) (striking two aggravators was harmless where three aggravators remained to be weighed against lack of a significant criminal history), cert. denied, 115 S. Ct. 940, 130 L. Ed. 2d 884 (1995); Stein v. State, 632 So, 2d 1361, 1367 (Fla.) (harmless error where four aggravators remained to be weighed against statutory mitigator), cert. denied, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994); Watts v. State, 593 So. 2d 198, 204 (Fla.) (eliminating HAC was harmless where three aggravators remained to be weighed against one statutory mitigator and one nonstatutory

mitigator), cert. denied, 505 U.S. 1210, 112 S. Ct. 3006, 120 L. Ed. 2d 881 (1992).

ISSUES IV AND V

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE HEINOUS, ATROCIOUS, OR CRUEL (HAC) AGGRAVATOR.

Lawrence argues both that the trial court gave the jury an unconstitutional instruction on the HAC aggravator and that the court erred in finding that the aggravator had been established. The complaint about the instruction has not been preserved for appeal. Moreover, the second part of this claim has no merit because the facts support the trial court's findings.

At the penalty-phase charge conference, Lawrence objected to the jury being instructed on the HAC aggravator because the evidence did not support that aggravator (R 438). The court disagreed, however, (R 438) and instructed the jury as follows:

> Second. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil.
>
> Atrocious means outrageously wicked and vile.

> Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and unnecessarily torturous to the victim.

(R 556-57). After the jury retired to deliberate, both sides responded negatively to the court's asking if there were any objections to the instructions. (R 562). By failing to object to the instruction's wording, Lawrence failed to preserve this issue for appeal, and it should be denied summarily. Hannon v. State, 638 So. 2d 39 (Fla. 1994); Krawczuk v. State, 634 So. 2d 1070 (Fla.), cert. denied, 115 S. Ct. 216, 130 L. Ed. 2d 143 (1994); Freeman v. State, 563 So. 2d 73 (Fla.), cert. denied, 111 S. Ct. 2910, 115 L. Ed. 2d 1071 (1990).

Moreover, as Lawrence acknowledges (initial brief at 39), the HAC instruction given to his jury is identical to the instruction approved in Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993). This Court has been consistent in following Hall. Geralds v. State, 674 So. 2d 96 (Fla. 1996); Finney v. State, 660 So. 2d 674 (Fla. 1995); Johnson v. State, 660 So. 2d 637 (Fla. 1995); Fennie v. State, 648 So. 2d 95 (Fla. 1984), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083

(1995); Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995); Taylor v. State, 630 So. 2d 1038 (Fla. 1993), cert. denied, 115 S. Ct. 518, 130 L. Ed. 2d 424 (1994). Even if this Court were to consider this procedurally barred issue, Lawrence has shown no good reason why this Court should overturn Hall and the cases that followed it.

If this Court were to find error in the HAC instruction, any error would be harmless because this murder was HAC under any definition of those terms. The trial court made the following findings regarding the WAC aggravator:

> 2. The capital felony was especially heinous, atrocious, or cruel. - Section 921.141(5)(h), Florida Statutes.
>
> The victim while lying asleep on a couch was repeatedly beaten with a metal pipe until the point that the pipe bent. The Defendant inflicted multiple blunt trauma wounds to the head and upper chest area. After the initial beating, the victim, obviously still conscious, cried out "stop it, if you stop, I'll leave." This plea for mercy was met with yet more beating to the point where the victim's face was literally torn apart as previously described. The Defendant's concern then shifted to a confederate flag which he had hanging from the wall behind the victim and the blood which was spattered upon the flag. He then required one of the minor children to remove the flag and even after the horrific beating inflicted upon the victim by the Defendant the victim remained alive because the young girl while leaning over his

> body could hear him whisper "help." The Defendant then required his wife to stab the victim and thereafter while still alive, the Defendant shoved a mop handle into the victim's throat. The circumstances surrounding this homicide clearly evince Defendant's absolute disregard for the victim's life not to mention the pain inflicted upon the victim by the manner of death. The victim was repeatedly beaten with blunt instruments and stabbed. This torturous process culminated with the puncturing of the victim's throat with a mop handle approximately one inch in diameter. The victim, having been beaten, not being able to feel his legs, and then beaten again, must have surely realized that his death was imminent.

(R 232-33). The facts support these findings.

David Nicholson, the medical examiner, described the wounds inflicted on the victim. There were multiple large fractures and lacerations of the victim's head (T 549-50) with fifteen or more blunt trauma wounds in a five-inch-diameter area. (T 551-52). The victim's lower left jaw was fractured (T 551), and there was a one-inch-diameter hole in the back of his throat where the mop handle was inserted. (T 553). The victim was alive when the mop handle was forced down his throat (T 554), but was dead when the body was set on fire, (T 556). The severe burning obscured any defensive injuries that might have been inflicted on the victim's hands and

arms. (T 548). The cause of death was blunt trauma with "an element of asphyxia." (T 557).

Kim Pitts, Lawrence's sixteen-year-old stepdaughter, testified that she heard "pounding noises" from the living room (T 322), after which she heard the victim say: 'Please don't hit me. Please don't hit me. I'm sorry. Don't hit me anymore. I'm already bleeding." (T 323). After that, she heard more pounding. (T 323). When she went into the living room, Lawrence told her to take his flag down from the wall above the victim. As she leaned over the victim, who was badly injured, she heard him say "Help" and someone's name that she could not understand. (T 324).

Rachael Mayton, Kim's fifteen-year-old friend, testified that she heard some pounding, about ten times, that "[s]ounded like some kind of metal object hitting something soft," (T 277). Then, she heard the victim say: "Stop it. If you stop I'll leave; I'll get my things together and leave." (T 277-78). She heard the victim say this several times and then heard more pounding. (T 278). When she saw the victim later, the skin had been torn off his face so that bone was visible. (T 285).

Chris Wetherbee, a neighbor who helped prepare the victim's body for disposal, testified that Lawrence told him that he beat the victim with a steel pipe until the pipe bent, that the victim

said he could not move, and that Lawrence then went and got a baseball bat and beat the victim with it. (T 362). Charles Grice of the Santa Rosa County Sheriff's Office testified that, during his confession, Lawrence stated that he beat the victim in the head with a pipe and a baseball bat, stabbed him twice, and shoved the mop handle down the victim's throat. (T 425).

This Court has found HAC applicable to virtually **all** beating deaths. E.g., Bogle v. State, 655 So. 1103 (Fla. 1995) (seven blows to the head established HAC); Whitton v. State, 649 So. 2d 861 (Fla. 1994) (estimated thirty-minute beating established HAC aggravator), cert. denied, 116 S. Ct. 106 (1995); Colina v. State, 634 So. 2d 1077 (Fla.) (beating deaths were HAC), cert. denied, 115 s. ct. 330, 130 L. Ed. 2d 289 (1994); Bowden v. State, 588 So. 2d 225 (Fla. 1991) (beating victim to death with rebar was HAC), cert. denied, 503 U.S. 975, 112 S. Ct. 1596, 118 L. Ed. 2d 311 (1992); Penn v. State, 574 So. 2d 1079 (Fla. 1991) (beating victim to death with hammer was HAC) ; Bruno v. State, 574 So. 2d 76 (Fla.) (beating victim to death with crowbar was HAC), cert. denied, 502 U.S. 834, 112 S. ct. 112, 116 L. Ed. 2d 81 (1991); Cherry v. State, 544 So. 2d 184 (Fla. 1989) (HAC where victim was literally beaten to death), cert. denied 494 U.S. 1090, 110 S. Ct. 1835, 108 L. Ed. 2d 963 (1990); Chandler v. State, 534 So. 2d 701 (Fla. 1988) (beating

victims to death with baseball bat was HAC), cert. denied, 490 U.S. 1075, 109 S. Ct. 2089, 104 L. Ed. 2d 652 (1989); Lamb v. State, 532 so. 2d 1051 (Fla. 1988) (beating victim to death with hammer was HAC); Roberts v. State, 570 So. 2d 885 (Fla. 1987) (victim's death from blows to the head was HAC), cert. denied, 485 U.S. 943, 108 S. Ct. 1123, 99 L. Ed, 2d 284 (1988); Heiney v. State, 447 So. 2d 210 (Fla.) (bludgeoning death was HAC), cert. denied, 469 U.S. 920, 105 S. Ct. 303, 83 L. Ed. 2d 237 (1984); Adams v. State, 341 So. 2d 765, 769 (Fla. 1976) (HAC where Adams "murdered his victim by beating him past the point of submission and until his body was grossly mangled"), cert. denied, 434 U.S. 878, 98 S. Ct. 232, 54 L. Ed. 2d 158 (1977). Lawrence argues that he did not have the requisite intent to make this murder HAC. This argument, however, ignores the fact that the HAC aggravator applies to the nature of the killing and the surrounding circumstances, Gorby v. State, 630 So. 2d 544 (Fla. 1993), cert. denied, 115 S. Ct. 99, 130 L. Ed. 2d 48 (1994); Stano v. State, 460 So. 2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S. Ct. 2347, 85 L. Ed. 2d 863 (1985); Mason v. State, 438 So. 2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 s. ct. 1330, 79 L. Ed. 2d 725 (1984). "In determining whether the circumstances of heinous, atrocious or cruel applies, the mind set or mental anguish of the victim is an important

factor." Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988), cert. denied, 489 U.S. 1040, 109 S. Ct. 1175, 103 L. Ed. 2d 237 (1989); Wyatt v. State, 641 So. 2d 1336 (Fla. 1994), cert. denied, 115 S. ct. 1983, 131 L. Ed. 2d 870 (1995); Phillips v. State, 476 So. 2d 194 (Fla. 1985). As this Court has held many times, fear and emotional strain preceding a victim's death contribute to the heinous nature of that death. Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, 114 S. Ct. 538, 126 L. Ed. 2d 596 (1993); Preston v. State, 607 So. 2d 404 (Fla. 1992), cert. denied, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993); Adams v. State, 412 So. 2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S. Ct. 182, 74 L. Ed. 2d 148 (1982).

The cases that Lawrence relies on are factually distinguishable. In both Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), and Herzog v. State, 439 So. 2d 1372 (Fla. 1983), this Court held the HAC aggravator inapplicable due to the victims' semi-consciousness caused by alcohol or drug use. Jackson v. State, 451 so. 2d 458 (Fla. 1984), is also distinguishable because the victim lost consciousness moments after being shot the first time. Here, on the other hand, several witnesses testified that the victim was not only still alive, but conscious and talking after being beaten with the pipe and bat.

The shooting cases other than <u>Jackson</u>, are also distinguishable. Rather than being 'an appropriate bench mark against which to measure the suffering inflicted" on the victim (initial brief at 35), <u>Lewis v. State</u>, 377 So. 2d 640 (Fla. 1979), has little in common with this case beyond the victim's being dead. Lewis' victim died from several quick gunshots accompanied by no additional acts that set the killing apart from the norm of most murders. There is a qualitative difference between Lewis' killing his victim with rapid gunshots and Lawrence's protracted beating of his victim to a bloody pulp. In <u>Robinson v. State</u>, 574 So. 2d 108 (Fla. 1991), the victim was told that she would not be killed and then died almost instantaneously from a single gunshot to the head. In <u>Amoros v. State</u>, 531 So, 2d 1256 (Fla. 1988), the victim and his killer were strangers and there were no additional acts beyond three quick gunshots. This Court found the murder in <u>Porter v. State</u>, 564 So. 2d 1060 (Fla. 1990), <u>cert. denied</u>, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 1106 (1991), not to be HAC because it considered Porter's shooting his lover several times to be a crime of passion. In <u>Shere v. State,</u> 579 So. 2d 86 (Fla. 1991), the victim had no defensive wounds, died from rapid, close-range gunshots, any one of four of the five shots was fatal, and there was no evidence that Shere meant to torture his victim. In <u>Green</u>

V. State, 641 So. 2d 391 (Fla. 1994), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995), the victim died from a single gunshot.

The facts in the instant case are vastly different from the cases that Lawrence relies on and prove this murder to have been heinous, atrocious, or cruel. Although the victim had a high postmortem blood alcohol reading, he was conscious during the attack on him and repeatedly asked Lawrence to stop hitting him and for help. He, thus, obviously was alive during the beating and, according to Wetherbee, finally died only after Lawrence withdrew the mop handle that he had forced down the victim's throat. (T 361-62). This case is a far cry from cases where the victims were unconscious or were killed by single or rapid gunshots. Instead, the instant victim was conscious and suffered through a prolonged, brutal attack. His death was not swift, merciful, or relatively painless. The record supports the trial court's finding WAC in aggravation, and this Court should affirm the trial court's findings,

ISSUE VI

WHETHER THE PENALTY-PHASE INSTRUCTIONS CREATED AN IMPROPER PRESUMPTION THAT A DEATH SENTENCE WAS MANDATORY.

Lawrence argues that the penalty-phase instructions on weighing aggravators and mitigators "created a reasonable likelihood that the jury would have believed that a death sentence was mandatory if mitigating factors did not outweigh aggravating factors." (Initial brief at 41). This issue has not been preserved for appeal. Even if cognizable, however, it has no merit.

The court gave the jury the following instructions:

> If one or more aggravating circumstances are established you should consider all of the evidence tending to establish one or more of the mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
>
> * * *
>
> The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law.
>
> **You** should weigh aggravating circumstances against the -- excuse me, you should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these considerations.

(R 559-60). Lawrence acknowledges that with these instructions 'a jury could appropriately determine that even though aggravating circumstances outweigh mitigating circumstances, the mitigating circumstances are still weighty enough to recommend a life sentence." (Initial brief at 42). The court also gave the jury the following standard instructions:

> If you find the aggravating circumstances do not justify the death penalty your advisory sentence should be one of life in prison without the possibility of parole.
>
> should you find that sufficient aggravating circumstances do exist it will then be your duty to determine if mitigating circumstances exist that outweigh the aggravating circumstances.

(R 558). Lawrence argues that this "burden-shifting" instruction could create a death-prone jury that thought it had to recommend the death penalty,

This burden-shift, presumption of death argument is procedurally barred, however, because Lawrence did not object to these instructions at trial. Hunter v. State, 660 So. 2d 244 (Fla. 1995); Wuornos v. State, 644 So. 2d 1012 (Fla. 1994), cert. denied, 115 S. Ct. 1708, 131 L. Ed. 2d 568 (1995); Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), cert. denied, 113 S. Ct. 2377, 124 L. Ed. 2d 282 (1993). Furthermore, there is no merit to the argument.

Johnson v. State, 660 So. 2d 637 (Fla. 1995); Sochor v. State, 619 So. 2d 285, 291 n.10 (Fla.), cert. denied, 114 S. Ct. 638, 126 L. Ed. 2d 596 (1993); Robinson v. State, 574 So. 2d 108 (Fla.), cert. denied, 502 U.S. 841, 112 S. Ct. 131, 116 L. Ed. 2d 99 (1991). As this Court has stated previously:

> Under subsection 921.141(2) death may be the appropriate recommendation if, and only if, at least one statutory aggravating factor is established. After an aggravator has been established, any mitigating circumstance established by the evidence must be weighed against the aggravator(s). Florida's death penalty statute, and the instructions and recommendation forms based on it, set out a clear and objective standard for channeling the jury's discretion.

Dousan v. State, 595 So. 2d 1, 4 (Fla.), cert. denied, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992). Therefore, this claim should be denied.

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY CONSIDERED THE MITIGATING EVIDENCE.

Lawrence complains that the trial court erred in rejecting some of his proposed mitigators. There is no merit to this issue.

In Rosers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988), this Court set out the manner in which trial courts should address proposed

mitigating evidence. Under the Rosers procedure a trial court must "consider whether the facts alleged in mitigation are supported by the evidence[,] . . . must determine whether the established facts are of a kind capable of mitigating the defendant's punishment[, and] . . . must determine whether they are of sufficient weight to counterbalance the aggravating factors." Id. at 534. Whether the greater weight of the evidence establishes a proposed mitigator "is a question of fact." Campbell v. State, 571 So. 2d 415, 419 n.5 (Fla. 1990); Lucas v. State, 613 So. 2d 408 (Fla. 1992), cert. denied, 114 S. Ct. 136, 126 L. Ed. 2d 99 (1993). Moreover, a trial court has broad discretion in determining whether mitigators apply, and the decision on whether the facts establish a particular mitigator lies with the trial court and will not be reversed because this Court or an appellant reaches a contrary conclusion. Foster (Jermaine) v. State, 21 Fla. L. Weekly S324 (Fla. July 18, 1996); Foster (Charles) v. State, 654 So. 2d 112 (Fla.), cert. denied, 116 S. Ct. 314, 133 L. Ed. 2d 217 (1995); Pietri v. State, 644 So. 2d 1347 (Fla. 1994), cert. denied, 115 S. Ct. 2588, 132 L. Ed. 2d 836 (1995); Wvatt v. State, 641 So.2d 355 (Fla. 1994), cert. denied, 115 S. Ct. 1372, 131 L. Ed. 2d 227 (1995); Arbelaez v. State, 626 So. 2d 169 (Fla. 1993), cert. denied, 114 S. Ct. 2123, 128 L. Ed. 2d 678 (1994); Preston v. State, 607 So. 2d 604 (Fla.

1992), cert. denied, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993); Sireci v. State, 587 So. 2d 450 (Fla. 1991), cert. denied, 112 S. ct. 1500, 117 L. Ed. 2d 639 (1992). A trial court's finding that the facts do not establish a mitigator "will be presumed correct and upheld on review if supported by 'sufficient competent evidence in the record." Campbell, 571 So. 2d at 419 n.5 (quoting Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1991)); Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, 114 S. Ct. 453, 126 L. Ed. 2d 385 (1993); Lucas; Johnson v. State, 608 So. 2d 4 (Fla. 1992), cert. denied, 113 S. Ct. 2366, 124 L. Ed. 2d 273 (1993); Ponticelli v. State, 593 So. 2d 483 (Fla. 1991), aff'd on remand, 618 So. 2d 154 (Fla.), cert. denied, 114 S. Ct. 352, 126 L. Ed. 2d 316 (1993). Resolving conflicts in the evidence is the trial court's duty, and its decision is final if supported by competent substantial evidence. Parker v. State, 641 So. 2d 369 (Fla. 1994), cert. denied, 115 S. Ct. 944, 130 L. Ed. 2d 888 (1995); Lucas; Johnson; Sireci; Gunsby v. State, 574 So.2d 1085 (Fla.), cert. denied, 112 S. Ct. 136, 116 L. Ed. 2d 103 (1991). Applying these principles to the instant case, it is obvious that the trial court properly considered the proposed mitigating evidence.

At the penalty phase Lawrence presented testimony from his older brother; James Larson, a psychologist; and Glenn Galloway, a

psychiatrist. The jury recommended that Lawrence be sentenced to death by a vote of nine to three. (R 203; 564). The trial court scheduled a sentencing hearing for April 27, 1995, and each side filed a sentencing memorandum. In his memorandum Lawrence argued that both statutory mental mitigators and the following nonstatutory mitigators had been established: 1) Lawrence cooperated with the police; 2) he has a learning disability and low IQ; 3) he had a deprived childhood and poor upbringing; 4) the murder resulted from a heated domestic dispute; 5) Lawrence is addicted to alcohol and drugs and was under the influence of alcohol at the time of the murder; 6) he has mental health problems; 7) Brenda Lawrence, an equally culpable codefendant, might be sentenced to life imprisonment; and 8) Lawrence had no history of violence. (R 216-20). After the parties argued their respective positions on sentencing on April 27, the trial court set the actual sentencing for May 5, 1995. (R 607). On that date the court sentenced Lawrence to death, finding three aggravators that outweighed five nonstatutory mitigators. (R 538-39; 613).

The trial court made the following findings as to the proposed statutory mitigators:

> The Court has also considered all the evidence and circumstances presented during the guilt/innocence phase of the trial as well

as the penalty proceedings and sentencing hearing with regard to the statutory mitigating circumstances and is of the opinion that none of the specific statutory mitigating circumstances were reasonably established by the Defendant. The Defendant urges the Court to find the following statutory mitigating circumstances to be reasonably established by the evidence.

1. The murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance. - Section 921.141(6)(b), Florida Statutes.

Although the evidence presented during the penalty phase of these proceedings showed that the Defendant does in fact have a low IQ and came from a troubled family background, said evidence does not rise to the level of "extreme mental or emotional disturbance." The testimony of James Larson, Ph.D., was clear that in his opinion the Defendant was not acting under the influence of an extreme mental or emotional disturbance. The Court recognizes that this issue must not be determined solely upon the opinion of an expert witness but must be based upon the totality of the circumstances at the time the murder was committed. The evidence shows that the Defendant had been drinking alcoholic beverages the better part of the day in question and from time to time appeared to be irritated by the attention his wife was paying to the victim but his actions throughout the day did not show any evidence that the Defendant was laboring from an <u>extreme</u> mental or emotional disturbance (emphasis added).

2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of

the law was substantially impaired. - Section 921.141(6) (f), Florida Statutes.

The Defendant in his Memorandum of Law in opposition of the death penalty does not dispute that he could appreciate the criminality of his conduct but argues that because of his high degree of intoxication and emotional distress over being involved in a "love triangle" had substantially diminished capacity to conform his conduct to the requirements of the law. Again, although there is no question that the Defendant had been drinking heavily the day in question the effects of the alcohol did not appear to prevent the Defendant from conforming his conduct to the requirements of the law. Specifically, he was able to recognize the necessity for driving his wife to and from work. He was also able to communicate and visit with his friends and even when confronted with the affair between his wife and the victim was able to control himself after an initial outburst of anger. It is significant that while engaged in the altercation with the victim, his 16 year old stepdaughter and wife were able to successfully intervene without any difficulty in bringing the altercation to a conclusion. The Defendant quickly regained his composure[,] shook the victim's hand and suggested they go for a drive as they had earlier in the day.

Although not proposed by the Defendant, the court has considered the remaining statutory mitigating circumstances and does not find them applicable, Specifically, the Defendant did have a significant history of prior criminal activity and as previously mentioned was on controlled release after serving a prison sentence. There is no evidence to support in any way that the victim

> **was** a participant in the Defendant's conduct nor consented to the act. To the contrary, the victim lay asleep on the couch and upon realizing what was happening requested that the Defendant stop his actions and offered to leave the home. The Court is aware that the Defendant was an accomplice in the capital felony which was also committed by another person. However, this Defendant's participation **was** not minor but in fact was a direct cause of the victim's death. There is no evidence to support the premise that Defendant was acting under extreme duress or under the substantial domination of another person. The Court finds to some degree that some of the Defendant's wife's actions may have agitated the Defendant but none of her actions place the Defendant under extreme duress or under her substantial domination. Finally, the age of the Defendant at the time of the crime is not a statutory mitigating fact in that he was approximately [37} **years** of age.

(R 234-36). Lawrence claims that the trial court erred in rejecting the second statutory mental mitigator, i.e., his ability to conform his conduct to the requirements of the law was substantially impaired. (Initial brief at 44). He relies on Dr. Galloway's testimony in making this claim, but provides no record citation to support it.

The record, however, discloses that Galloway did not testify specifically that either of the statutory mental mitigators applied. (R 496-520). On cross-examination Galloway acknowledged that Dr. Larson thought that Lawrence did not meet the requirements

for those mitigators. Lawrence ignores Larson's testimony that Lawrence had the type of personality generally seen in the criminal population (R 488), that he was less likely to conform his behavior to the requirements of the law (R 489), and that, although impulsive, he was able to understand the difference between right and wrong. (R 490). In his written report Larson stated unequivocally that neither of the statutory mental mitigators applied to Lawrence. (Defendant's exhibit 4 at 9). Thus, it is readily apparent that the record supports the trial court's findings that the statutory mitigators had not been established, and the trial court's conclusions should be affirmed. Cf. Foster (Jermaine), 21 Fla. L. Weekly at S326 (trial court has discretion to reject expert testimony that mental mitigators apply); Bruno v. State, 574 So. 2d 76 (Fla.) (same), cert. denied, 502 U.S. 834, 112 S. ct. 112, 116 L. Ed. 2d 81 (1991).

The trial court made the following findings in holding that Lawrence had established five nonstatutory mitigators:

> The Court finds that the evidence does support a finding of the following nonstatutory mitigating circumstances which are all entitled to be weighed against the aggravating circumstances:
>
> 1. The Defendant's cooperation with law enforcement. The Defendant did, in fact, give a recorded statement to the law enforcement

officers admitting his actions in this murder. The Defendant also cooperated with law enforcement by accompanying them to the Sheriff's Department without offering any resistance.

2. The Defendant's learning disability. The Court also finds that the Defendant's low IQ is a mitigating factor. However, the Defendant appeared to be able to function in society and as pointed out in the penalty proceeding many people with low IQS do not commit serious criminal offenses such as this instant case.

3. The Defendant's deprived childhood and poor upbringing. There is no question that the Defendant had a poor childhood and was most likely the product of a dysfunctional family. This was corroborated by the Defendant's brother.

4. The Defendant was under the influence of alcohol at the time of the murder. Again, there is no question that at the time of the murder, the Defendant was under the influence of alcohol. Alcohol, however, affects different people in different ways. Some tolerate alcohol better than others. The real issue, therefore, is whether or not the alcohol ingested by the Defendant rose to the level which prevented him from calculating and premeditating his actions. Although under the influence of alcohol, the evidence clearly demonstrated that the effects of the alcohol on this particular Defendant did not prevent him from controlling his temper or calculating his actions. The Court therefore, will place little weight on this factor.

5. The Defendant does not have a violent history. Although the Defendant does have a history of prior criminal offenses, it is true

> that there is no history of a violent nature. This factor, however, is entitled to little weight in view of the nature and circumstances surrounding this case.

(R 236-37). The court rejected the other proposed nonstatutory mitigators:

> The Defendant also purports as a nonstatutory mitigating factor that the murder was as a result of a heated domestic dispute, specifically a love triangle. The Court is of the opinion that the evidence presented does not reasonably establish this nonstatutory mitigating factor. In the numerous cases cited by the Defendant to support this position, the murder was committed during the "heat of passion". As the Court has previously indicated, it is of the opinion that the wife's actions agitated the Defendant but the actual murder took place a significant period of time after the Defendant was made aware of this wife's affair with the victim and while the victim lay asleep. The Defendant was jealous of his wife but he and his wife appeared to act in concert in the commission of this murder and the Defendant's actions were not as a result of a "heated domestic dispute".
>
> The Defendant also asserts mental health problems, but this Court is of the opinion that this factor duplicates the Defendant's learning disability factor and marginal IQ which has already been considered by this Court.
>
> Finally, the Defendant asserts that there is an equally culpable co-defendant who might receive disparate treatment. Unquestionably, Brenda Lawrence participated in and was a principal to the murder of the victim in this

> case. There is no evidence, however, that she encouraged her husband to commit the murder and her actions clearly did not rise to the same level of those of this Defendant. The Defendant played the major role in this murder and he was the one who inflicted the fatal blows to the victim. ***Van Poyck v. State of Florida,*** 564 So.2d 1066 (Fla. 1990).

(R 237-38).

Lawrence now argues that the trial court erred in rejecting the three nonstatutory mitigators. He has, however, demonstrated no abuse of discretion and, thus, no basis for relief.

The record supports rejection of the murder being the result of a domestic dispute. Testimony at the penalty phase established that Lawrence had been released from prison on conditional release on January 10, 1994. (R 455). He met Brenda Pitts shortly after being released, and they married in March 1994. (Defendant's exhibit 4 at 4). They did not live together long, however, and at the time of the murder, July 1994, Lawrence was not living in Brenda's apartment. (T 604; 630; 633). Each ran around on the other, and one friend described them as not living like a married couple. (T 605). When Brenda dallied with other men, Lawrence got mad at her, not the men. (T 605; 629). Instead of being the result of a heated domestic dispute, this was a cold-blooded execution, and the trial court properly rejected this proposed

mitigator.[5] Arbelaez, 626 So. 2d at 177-78; Occhicone. 570 So. 2d at 905; Porter, 564 So. 2d at 1064; Turner, 530 So. 2d at 51.

The trial court also rejected Lawrence's mental health problems as a separate mitigator and, instead, combined them with its consideration of Lawrence's learning disability and marginal IQ. As this Court has held, "the weight to be given a mitigator is left to the trial judge's discretion." Mann v. State, 603 So. 2d 1141, 1144 (Fla. 1992); Kilgore v. State, 21 Fla. L. Weekly S345 (Fla. August 29, 1996); Foster (Jermaine); Windom v. State, 656 So. 2d 432 (Fla. 1995); Jones v. State, 648 So. 2d 669 (Fla. 1994), cert. denied, 115 S. Ct. 2588, 132 L. Ed. 2d 836 (1995); Ellis v. State, 622 So. 2d 991 (Fla. 1993); Campbell; Swafford v. State, 533 So. 2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100, 109 S. Ct 1578, 103 L. Ed. 2d 944 (1989). Moreover, it is permissible for a trial judge to group nonstatutory mitigators and consider them

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[5] The domestic-dispute claim is also refuted by the jury's convicting Lawrence of theft of less than $300 and theft of the victim's motor vehicle. Although the court did not instruct the jury on or find the pecuniary gain aggravator, the evidence supported doing so. The victim received $200 the day he died (T 250-51; 257), and, after taking $47 from the victim, Lawrence complained that he thought there would be more. (T 287). Moreover, neither Lawrence nor Brenda had a car, and they discussed how to have the title to the victim's car put in their names, both with each other (T 293) and with other people. (T 522; 525). See Allen v. State, 662 So. 2d 323 (Fla. 1995).

collectively. Reaves v. State, 639 So. 2d 1 (Fla.), cert. denied, 115 S. Ct. 488, 130 L. Ed. 2d 400 (1994); see also Mungin v. State, 21 Fla. L. Weekly S66, S68 (Fla. February 8, 1996) (reference to being rehabilitable encompassed prison record; reference to mental health report encompassed drug and alcohol use). Contrary to the claim that **Lawrence** "became less thoughtful, more impulsive and acted violently" (initial brief at 45), the evidence demonstrated **Lawrence's** command of his faculties through his purposeful conduct.[6] See Johnson, 608 So. 2d at 13. Lawrence has shown no reversible error.

The trial court also correctly rejected Brenda's disparate treatment as a nonstatutory mitigator. At the April 27 hearing defense counsel made the following statement:

> I learned this morning sitting in here a few minutes ago that the State is not going to seek an override on Mrs. Lawrence. And I am not arguing that it is not constitutional for that to happen, that is not where I am coming from. And I agree without having read the cases that it is constitutional to give one co-defendant life and the other death or whatever.

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[6] Lawrence and Brenda were observed whispering together, obviously planning the murder (T 271), both gathered the weapons used to kill the victim and Lawrence stated "that they were going to knock off Mike" (T 274-76), and Lawrence, by himself, left the living room and retrieved the mop handle that he then forced down the victim's throat.

> I think what these cases suggest though is that when you have a co-defendant that is equally culpable -- and we argue that Brenda Lawrence is -- that it is unfair or a mitigator for one to receive a death penalty and not the other.

(R 603-04).[7] Lawrence now argues that Brenda was equally culpable because she 'did everything but physically batter" the victim. (Initial brief at 46). As noted by the trial court, however, this is a critical distinction between Lawrence's conduct and Brenda's. Lawrence actually killed the victim; he was the major participant in this murder.

As this Court has long recognized: "It is permissible to impose different sentences on capital codefendants where their various degrees of participation and culpability are different from one another." White v. Dugger, 523 So. 2d 140, 141 (Fla.), cert. denied, 488 U.S. 871, 109 S. Ct. 184, 102 L. Ed. 2d 153 (1988); Cardona v. State, 641 So. 2d 361 (Fla. 1994), cert. denied, 115 S. Ct. 1122, 130 L. Ed. 2d 1085 (1995); Hannon v. State, 638 So. 2d 39 (Fla. 1994); Steinhorst v. Singletary, 638 So. 2d 33 (Fla. 1994);

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[7] In the sentencing order the trial court wrote: "The jury in the Brenda Lawrence case returned an advisory sentence that Co-Defendant, Brenda Lawrence, be sentenced to life imprisonment. The Court followed that recommendation and on April 27, 1995, sentenced Brenda Lawrence to life imprisonment without eligibility for parole on the principal to first degree premeditated murder charge." (R 228).

Colina v. State, 634 So. 2d 1077 (Fla. 1994); Robinson v. State, 610 So. 2d 1288 (Fla. 1992), cert. denied, 114 S. Ct. 1205, 127 L. Ed. 2d 553 (1994); Coleman v. State, 610 So. 2d 1283 (Fla. 1992), cert. denied, 114 S. Ct. 321, 126 L. Ed. 2d 267 (1993); Hoffman v. State, 474 So. 2d 1178 (Fla. 1985). The trial court's determination that Brenda's sentence did not mitigate Lawrence's sentence because she was not an equally culpable codefendant is supported by the record. Lawrence has not shown an abuse of discretion, and this claim should be denied.

The trial court obviously followed the dictates of Campbell and considered the proposed nonstatutory mitigation. Cf. Barwick v. State, 660 So. 2d 685 (Fla. 1995); Armstrong v. State, 642 So. 2d 730 (Fla. 1994), cert. denied, 115 S. Ct. 1799, 131 L. Ed. 2d 726 (1995); Peterka v. State, 640 So. 2d 59 (Fla. 1994), cert. denied, 115 S. Ct. 940, 130 L. Ed. 2d 884 (1995); Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert. denied, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994); Tompkins v. State, 502 So. 2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S. Ct. 3277, 97 L. Ed. 2d 781 (1987). Even if the court erred in its consideration of the nonstatutory mitigators, any such error was harmless. Given the circumstances of the terrible crime committed on the victim and the presence of three strong aggravators, the proposed nonstatutory

mitigation is negligible, and there is no likelihood of a different sentence. Cf. Barwick; Pietri; Wuornos v. State, 644 So. 2d 1012 (Fla. 1994)) cert. denied, 115 S. Ct. 1705, 131 L. Ed. 2d 566 (1995); Armstrong; Peterka. Therefore, this Court should refuse to grant relief on this issue.

CONCLUSION

For the reasons set forth above, the State of Florida asks this Court to affirm Lawrence's conviction of first-degree murder and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BARBARA J. YATES
Assistant Attorney General
Florida Bar No. 293237

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Steve Seliger, 16 North Adams Street, Quincy, Florida 32351, this 12th day of September, 1996.

BARBARA J. YATES
Assistant Attorney General